

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DONALD WESTGARD,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

CASE NO. C16-5334 RBL-JRC

REPORT AND RECOMMENDATION

NOTED: AUGUST 26, 2016

The District Court has referred this petition for a writ of habeas corpus to United States Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.

Petitioner Donald Westgard, proceeding *pro se* and *in forma pauperis*, filed this habeas petition on May 12, 2016. Dkt. 5. On May 24, 2016 the Court ordered petitioner to show cause and file an amended petition. Dkt. 8. In response, on June 15, 2016, petitioner filed a Motion to Withdraw Habeas Petition Without Prejudice. Dkt. 9. Respondent has not filed either an answer or a motion for summary judgment.

Accordingly, the Court should find dismissal is warranted and grant petitioner's motion to withdraw his petition.

### DISCUSSION

Petitioner states, as reasons for his request to withdraw his petition, that the Court refuses to serve the parties, that the Court points out his failure to exhaust state remedies, and the Grays Harbor Clerk loses or misfiles submissions. *Id.*

Rule 41 of the Federal Rules of Civil Procedure ("Rule 41") allows for the voluntary dismissal of an action by a plaintiff (or petitioner) without prejudice and without a court order before the opposing party serves either an answer or a motion for summary judgment.

Fed.R.Civ.P. 41(a)(1); *Hamilton v. Shearson-Lehman Am. Express, Inc.*, 813 F.2d 1532, 1534 (9th Cir.1987).

Federal Rules of Civil Procedure 41(a)(1)(A)(i) provides:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; . . .

Fed. R. Civ. P. 41(a)(1)(A)(i).

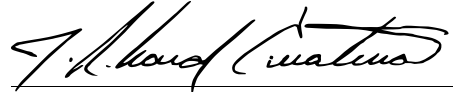
### CONCLUSION

Because respondent has not filed an answer, the undersigned recommends that, pursuant to Rule 41, the Court grant his Motion to Withdraw Habeas Petition Without Prejudice. Dkt. 9.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), Petitioner shall have fourteen (14) days from service of this Report and Recommendation to file written objections thereto. *See*

1 also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
2 purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit  
3 imposed by Rule 72(b), the Clerk is directed set this matter for consideration on **August 26, 2016**  
4 as noted in the caption.

5 Dated this 1<sup>st</sup> day of August, 2016.

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8 J. Richard Creatura  
9 United States Magistrate Judge  
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